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See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JUL 25 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:)	
)	
EVA ANGELINA ENCINAS TREJO,)	2 CA-CV 2007-0129
)	DEPARTMENT B
Petitioner/Appellant,)	
)	<u>MEMORANDUM DECISION</u>
and)	Not for Publication
)	Rule 28, Rules of Civil
LAMBERTO ARMENTA TREJO,)	Appellate Procedure
)	
Respondent/Appellee.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20064174

Honorable Kenneth Lee, Judge

VACATED IN PART AND REMANDED

Southern Arizona Legal Aid, Inc.
By Walter Anthony Wisz

Tucson
Attorneys for Petitioner/Appellant

Lamberto Armenta Trejo

Tucson
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Eva Trejo appeals from a decree of dissolution of marriage in which the trial court ruled she had no interest in real property owned by her former husband, appellee Lamberto Trejo. Eva argues the trial court abused its discretion by refusing to grant her an equitable interest in the property because community funds had been used to pay its mortgage. We vacate the dissolution decree in part and remand the case for the trial court to determine the community's interest in the property and enter an equitable distribution award accordingly.

¶2 The property at issue is a mobile home and the land on which it rests. After a brief bench trial at which the parties represented themselves, the trial court found that Lamberto purchased the property in February 1989, ten months before the parties were married, for \$29,500. He made a \$2,000 down payment and executed a note for \$27,500. Eva was never placed on the title, although the two married in December of that year. The monthly payment on the note was \$300 at an annual interest rate of twelve percent. In 1994, Lamberto refinanced the note, reducing the annual interest rate to ten percent and the monthly payment to \$212. At that time, the balance on the note was \$23,000. At the time of dissolution, the balance was between \$20,000 and \$22,000.

¶3 Eva testified that, although she did not know the balance of the mortgage, she had contributed to mortgage payments from the time the couple married until they separated, in 2003. When asked by the court how much money she had contributed to the property, Eva initially testified that she did not know; she then estimated her total contribution

between \$10,000 to \$12,000. The trial court found this figure “not credible,” noting that “[t]he monthly payments just barely exceeded the interest on the Note.” Lamberto denied Eva had contributed anything and implied he had paid the mortgage with his Social Security retirement funds.

¶4 Both parties agreed, however, that the property had appreciated since it was purchased. Though neither party had secured an appraisal, Eva valued it at approximately \$68,000; Lamberto gave an estimate between \$50,000 and \$60,000. In its dissolution decree, the court found “any appreciation of the property [wa]s attributable to a simple increase in the value of the land over time and not to any improvements made to the property.” The court also found Eva “ha[d] no legal or equitable interest or lien on the . . . residence.”

¶5 Notwithstanding the cause of the property’s appreciation, Eva argued in a motion to amend the decree that “the community . . . ha[s] an equitable interest in th[e] appreciation to the extent that it contributed community-funded mortgage payments.” The trial court denied the motion, finding Eva “[wa]s the one asserting the community lien and ha[d] the obligation to present evidence to support her position. [She] has failed to do this.” The court further found Lamberto “retired in 2001 or 2002 and lives on social security retirement. This is his only source of income. [He] has made the payments on the home.” The court also observed that neither party had presented evidence of the value of the home or the balance of the mortgage at the time of the marriage, the time Lamberto retired, or the

time the petition for dissolution was filed. Consequently, the trial court essentially concluded it did not have information necessary to determine the community's interest in the property.

¶6 Eva acknowledges the separate character of Lamberto's property, but she argues on appeal the trial court erred in not granting her an equitable interest in it. She contends there is a legal presumption that community funds were applied to the mortgage payments while the two were married, and "[t]here was no evidence presented that any separate funds were used to pay the mortgage during the marriage." Based upon the evidence presented below, we agree that the trial court erred by denying the community any interest in the property.

¶7 We review a trial court's distribution of property for an abuse of discretion. *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, ¶ 4, 169 P.3d 111, 113 (App. 2007). In so doing, we view the evidence in the light most favorable to upholding the ruling, and we will not disturb the court's apportionment of property if it is reasonably supported by the evidence. *Kohler v. Kohler*, 211 Ariz. 106, ¶ 2, 118 P.3d 621, 622 (App. 2005). However, "[a]n abuse of discretion may occur when a trial court commits an error of law in the process of exercising its discretion." *Id.*

¶8 When community funds are put toward mortgage payments for one spouse's separate property, the community is entitled to recover its contribution to the principal as well as a proportionate share of the property's appreciated value, regardless of whether the

community's expenditures caused the value of the property to increase. *Bell-Kilbourn*, 216 Ariz. 521, ¶ 12, 169 P.3d at 114; *Drahos v. Rens*, 149 Ariz. 248, 249-50, 717 P.2d 927, 928-29 (App. 1985). The community's interest in the separate property is a right to reimbursement, which a spouse may protect by way of an equitable lien.¹ See *Lawson v. Ridgeway*, 72 Ariz. 253, 261-62, 233 P.2d 459, 465 (1951); *Horton v. Horton*, 35 Ariz. 378, 382, 278 P. 370, 371 (1929); *Pollock v. Pollock*, 499 P.2d 231, 237 (Wash. Ct. App. 1972). The court has discretion in a dissolution action to impress a lien on one spouse's separate property to secure the other spouse's interest or equity in it. A.R.S. § 25-318(C)(1); *Wayt v. Wayt*, 123 Ariz. 444, 446, 600 P.2d 748, 750 (1979). The community's interest "is determined by adding the principal balance paid by the community to the product of the community property principal payments divided by the purchase price times the appreciation in value." *Drahos*, 149 Ariz. at 250, 717 P.2d at 929.

¶9 However, given the presumption that all property owned during a marriage belongs to the community, a spouse who claims separate funds were used to make mortgage payments during a marriage must establish this fact by clear and convincing evidence. *Drahos*, 149 Ariz. at 251, 717 P.2d at 930; see also *Sommerfield v. Sommerfield*, 121 Ariz. 575, 577, 592 P.2d 771, 773 (1979). Here, the presumption of community payments was only rebutted as to those payments made by Lamberto with his Social Security benefits.

¹An equitable lien is defined as "[a] right, enforceable only in equity, to have a demand satisfied from a particular fund or specific property, without having possession of the fund or property." *Black's Law Dictionary* 934 (7th ed. 1999).

Such benefits are separate property, *see Kelly v. Kelly*, 198 Ariz. 307, ¶ 5, 9 P.3d 1046, 1047 (2000), but he did not begin receiving them until 2001, at the earliest. Because all wages or salaries earned during a marriage are community property, regardless of which spouse earns them, *id.* ¶ 4; *see also* A.R.S. § 25-211, and because we presume mortgage payments made with commingled funds used community funds, *Drahos*, 149 Ariz. at 251, 717 P.2d at 930, Lamberto's nonspecific testimony that Eva had contributed nothing did not itself demonstrate that no community resources had been used to pay the mortgage between 1989 and 2001.

¶10 Lamberto also testified he had used proceeds from the sale of a trailer that was separate property to make a \$4,000 down payment on the property before the parties married. After examining the loan documents, the court concluded that the down payment was only \$2,000. To the extent Lamberto suggested he reduced the principal amount by an additional \$2,000 using those separate funds, the trial court made no explicit finding on this matter. Yet even assuming the trial court had accepted his claim, Lamberto's separate expenditures still could not account for all of the principal payments, even at the time of refinancing.

¶11 Accordingly, the trial court was entitled to find that Lamberto had paid the mortgage with separate funds since 2001, when he began receiving his Social Security benefits, and it was not required to accept Eva's estimation of the community's total contribution to the property. *See Bender v. Bender*, 123 Ariz. 90, 94, 597 P.2d 993, 997

(App. 1979). The evidence presented, however, did not clearly and convincingly rebut the presumption that all mortgage payments made during the marriage had been paid with community funds. The community, therefore, had a right to compensation for its contributions to the separate property, and uncertainty regarding the exact amount of this interest was not a ground for the court to refuse to impress a lien upon the property. *Cf. Nelson v. Cail*, 120 Ariz. 64, 67, 583 P.2d 1384, 1387 (App. 1978) (when right to damages established, uncertainty as to amount will not preclude recovery).

¶12 Although we acknowledge the trial court received little assistance from the *pro se* litigants in determining the nature of the funds used to pay the mortgage or the precise amount of the community's interest in the property, the evidence presented at trial nevertheless allowed the court to calculate the latter figure. As the court noted in its dissolution decree, Lamberto made monthly payments on the note at a fixed annual interest rate. The court made findings regarding the purchase price and total amount of debt remaining on the property. Lamberto presented evidence of the mortgage's duration, and both parties testified the property had appreciated, which the court implicitly accepted. The evidence thus established a reasonable range within which the court could make a specific finding of appreciation at the time of dissolution. *Cf. Broadway Realty & Trust, Inc. v. Gould*, 136 Ariz. 236, 238, 665 P.2d 580, 582 (App. 1983) (trial court not required to accept testimony of witnesses regarding specific dollar amounts, but may make findings of fact within range allowed by evidence). The court could have determined the amount of

principal payments and remaining debt on the property at the relevant time periods using an amortization calculation.²

¶13 We therefore vacate the property distribution portion of the dissolution decree and remand the case to the trial court to enter an equitable distribution award that recognizes the community's interest in Lamberto's separate property. The court may impress a lien on Lamberto's property if necessary to secure Eva's interest in it. *See* § 25-318(C)(1); *see also Wayt*, 123 Ariz. at 446, 600 P.2d at 750 (equitable lien not necessary if party seeking it otherwise recompensed).

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge

²Any prenuptial appreciation on the property should be awarded to Lamberto, *see Drahos*, 149 Ariz. at 250 n.1, 717 P.2d at 929, n.1, provided he established his equity in the property at the time of the marriage. *See In re Marriage of Geraci*, 51 Cal. Rptr. 3d 234, 241-42 (Ct. App. 2006). But the trial court incorrectly concluded evidence of such appreciation was necessary to determine the parties' respective interests. *See, e.g., id.* at 242.

